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No. 97-526

In the Supreme Court of the United States

OCTOBER TERM, 1997

MARLENA RAMALLO, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Section 242(g) of the Immigration and Nationality Act (INA), as amended by Section 306(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), barred the courts below from exercising jurisdiction over petitioner's claim that her deportation, in violation of an alleged agreement with the government not to deport her, would violate due process.

2. Whether Section 242(g) of the INA, as amended by Section 306(a) of IIRIRA, bars courts from exercising jurisdiction over claims for relief that were pending in the courts on the date of IIRIRA's enactment.

3. Whether, in light of its conclusion that Section 242(g) bars the exercise of jurisdiction over petitioner's claim for relief, the court of appeals had the authority to vacate the district court's order and to remand with instructions to dismiss for lack of jurisdiction.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 114 F.3d 1210. The opinion of the district court denying the government's motion to dismiss for lack of jurisdiction (Pet. App. 14-28) is reported at 918 F. Supp. 11. The opinion of the district court denying both parties' motions for summary judgment (Pet. App. 29-54) is reported at 931 F. Supp. 884. The order of the district court granting relief to petitioner (Pet. App. 56-58) is reported at 934 F. Supp. 1. The district court's supplemental opinion on respondent's motion for clarification (Pet. App. 59-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1997. A petition for rehearing was denied on

August 8, 1997. Pet. App. 10. The petition for a writ of certiorari was filed on September 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Bolivia who entered the United States in 1972 and became a lawful permanent resident in 1978. In 1986, pursuant to a plea agreement with the United States Attorney's Office for the Eastern District of Virginia, petitioner was convicted of conspiracy to import cocaine into the United States, in violation of 21 U.S.C. 963. As part of the plea agreement, petitioner agreed to assist in the investigation and prosecution of drug traffickers. Petitioner was sentenced to a term of 18 months' imprisonment, of which she served 5-1/2 months. Pet. App. 3, 15.

Upon her release from prison, the Immigration and Naturalization Service (INS) issued an Order to Show Cause against petitioner, charging her with deportability based on her drug conviction. Pursuant to an agreement with the government (deportation agreement), petitioner conceded deportability, withdrew her request for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1982), and waived her right to appeal the decision of the immigration judge (IJ).[1] In exchange for the fore-

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[1] Before its repeal in 1996, Section 212(c) authorized the Attorney General, in her discretion, to waive the deportation of certain aliens lawfully admitted for permanent residence who had lived in this country for seven consecutive years. See 8 U.S.C. 1182(c) (1994). Because of 1996 legislation, however, the Attorney General no longer has the authority to grant

going and her continued cooperation with the Drug Enforcement Administration (DEA) after completion of the plea agreement, the government agreed to allow petitioner to stay in the country while she cooperated.[2] Pet. App. 3-4. Consistent with the terms of the agreement, the IJ, on May 10, 1988, ordered petitioner deported. Also consistent with the agreement, however, the INS did not immediately take steps to deport petitioner. *Id.* at 16. Petitioner pro-

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petitioner relief under Section 212(c). Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1277, amended Section 212(c) to exclude from the scope of its discretionary waiver provision "an[y] alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2) * * * (B)" of the INA (previously codified at 8 U.S.C. 1251(a)(2)(B) (1994)), which refers to convictions for controlled substance offenses. Because petitioner was convicted of a controlled substance offense and is deportable on that basis, she is no longer eligible for Section 212(c) relief.

Section 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, as of IIRIRA's effective date (Apr. 1, 1997), and was replaced with a new form of discretionary relief termed "cancellation of removal." See 8 U.S.C. 1229b (Supp. II 1996) (added by IIRIRA § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597). That new authority does not apply "in the case of an alien who is in exclusion or deportation proceedings before" April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(2), 110 Stat. 3657. And petitioner would not be eligible for cancellation of removal any way because of her drug-importation offense. See INA §§ 101(a)(43)(B), 240A(a)(3) (as amended by IIRIRA), 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3) (1994 & Supp. II 1996).

[2] Petitioner contends that the government agreed to permit her to remain in the United States permanently. Pet. App. 3.

vided cooperation to the government in the investigation and prosecution of drug traffickers. *Id.* at 16-17.

On February 10, 1992, the INS filed a motion to reopen the deportation proceedings so that petitioner could have the opportunity to reapply for relief from deportation under Section 212(c). The IJ granted the request to reopen, but petitioner failed to file any application for Section 212(c) relief. On April 15, 1992, the matter was dismissed for lack of prosecution. Pet. App. 4.[3]

Petitioner appealed the IJ's dismissal to the Board of Immigration Appeals (BIA or Board). Petitioner contended that the government had breached its deportation agreement with her, and that she had received ineffective assistance of counsel at her original deportation hearing. The INS moved to dismiss petitioner's appeal for lack of jurisdiction based on her numerous and unapproved departures from the United States while her final order of deportation was outstanding.[4] As petitioner did not dispute that she had left the country after entry of

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[3] The IJ also found that petitioner was ineligible for Section 212(c) relief because, as a result of the final order of deportation issued against her, she was no longer a "lawful permanent resident" eligible for such relief. Pet. App. 68.

[4] Under the immigration laws as in effect at the time, an alien who left the country while under a final order of deportation "self deported" and thereby eliminated any right to further administrative or judicial review of her deportation order. See 8 U.S.C. 1101(g); 8 U.S.C. 1105a(c) (1994) (repealed by IIRIRA § 306(b), 110 Stat. 3009-612); 8 C.F.R. 243.5. The INS learned of petitioner's departures only after it had agreed to move to reopen her deportation proceedings. See Pet. App. 17.

her deportation order, the BIA dismissed her case as unreviewable. Pet. App. 17-18, 82. The Board also found that petitioner had not shown that her deportation agreement with the government permanently protected her from deportation. *Id.* at 79. Petitioner then filed a petition for review of the Board's decision in the United States Court of Appeals for the Fourth Circuit. The case in the Fourth Circuit has been held in abeyance pending the resolution of the present litigation. *Id.* at 63-65.

2. In September 1995, petitioner filed a complaint in the United States District Court for the District of Columbia. She requested that the court declare her order of deportation null and void, enjoin the government from executing that order, and grant specific performance of the alleged terms of the deportation agreement (permanent protection from deportation and the grant of status of a lawful permanent resident). The government moved to dismiss the case based on lack of subject-matter jurisdiction, and both parties moved for summary judgment on the merits. Pet. App. 4.

On January 29, 1996, the district court ruled that it had subject-matter jurisdiction to hear petitioner's claims. Pet. App. 14-26.[5] On June 27, 1996, the court

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[5] In particular, the district court rejected the government's argument that its jurisdiction was precluded by 8 U.S.C. 1105a(a) (1994) (repealed by IIRIRA § 306(b)), which provided that judicial review of all orders of deportation must be sought in the courts of appeals. The court concluded that "[petitioner's] complaint does not challenge the validity of the deportation order or a determination made in the deportation proceedings. * * * Rather, [petitioner] alleges breach of an agreement and violation of her Fifth Amendment rights due to the alleged breach. [Petitioner] seeks specific enforcement of

denied both parties' motions for summary judgment, and scheduled an evidentiary hearing. See *id.* at 30, 36. On July 3, 1996, after that hearing, the district court granted petitioner's motion for summary judgment, which it had previously denied. *Id.* at 56-58. The court found that "the government is bound by its agreement entered into with [petitioner]." *Id.* at 57. That agreement, the court concluded, "is that, in exchange for [petitioner's] cooperation with the government in its effort to prosecute Latin American drug dealers and for [petitioner's] testimony with respect thereto, she would not be subject to deportation." *Ibid.* The court enjoined the government from deporting petitioner and directed the government to restore her to the status of a lawful permanent resident. *Id.* at 57-58.

3. On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 306(a)(2) of IIRIRA, 100 Stat. 3009-607, amends Section 242 of the INA to include the following provision:

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the agreement, by which the government allegedly is obligated to ensure that [she] may remain in this country, regardless of a finding of deportability or an order of deportation and independent of the administrative deportation proceedings." Pet. App. 24-25. The government disagrees with that characterization of petitioner's claim for relief.

> (g) Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

8 U.S.C. 1252(g) (Supp. II 1996). Section 306(c)(1) of IIRIRA further provides that Section 242(g) of the amended INA "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." 110 Stat. 3009-612.

4. The government appealed the district court's decision to the United States Court of Appeals for the District of Columbia Circuit. The government argued, among other things, that, after the enactment of Section 242(g) in IIRIRA, the courts clearly lacked jurisdiction to hear petitioner's claim, because that claim arose from "the decision or action by the Attorney General to * * * execute [a] removal order[]" against her. The court of appeals agreed with the government that IIRIRA "now undisputably deprives both courts of appeals and district courts of jurisdiction" to hear petitioner's claim, because that claim arises from the Attorney General's decision or action "to execute a removal order against [petitioner]." Pet. App. 5-6.

The court of appeals also determined that it retained appellate jurisdiction sufficient to vacate the district court's decision. Pet. App. 6-7. The court observed that, unless it had jurisdiction to dispose of

the case in that manner, the decision of the district court in a matter outside its statutory jurisdiction would escape review entirely, a result Congress had not intended in amending the INA. *Ibid.* The court analogized its action to "an appellate court's jurisdiction when a case becomes moot between the time a district court judgment is entered and the time it arrives at the appellate court for review." *Ibid.* Although the court observed that its action deprived petitioner of one forum for her constitutional claim, it noted that the government had "concede[d]" that habeas corpus review remains available for substantial constitutional claims. *Id.* at 8.[6]

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[6] At oral argument in this case, the attorney for the government stated, "Well, really constitutional habeas jurisdiction continues to exist. Correct, this Court has constitutional habeas jurisdiction, and would continue to have that jurisdiction to correct substantial constitutional errors." Tr. C.A. Oral Arg. 10-11. The government attorney did not state that a *district court* would have jurisdiction to issue a writ of habeas corpus; rather, the government's position was that the courts of appeals have authority to review a deportation order for substantial constitutional error. See *id.* at 13-14; cf. *Felker* v. *Turpin*, 116 S. Ct. 2333 (1996) (holding that Congress has not foreclosed Supreme Court's consideration of original habeas corpus petitions).

Since the decision below was issued, the government has further clarified its position on the availability of the writ of habeas corpus with respect to matters arising under the INA, in connection with pending litigation in the Second Circuit. See *Mojica* v. *Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997), appeals pending, Nos. 97-2599 and 97-2600 (2d Cir.); *Yesil* v. *Reno*, 958 F. Supp. 828, recons. denied, 973 F. Supp. 372 (S.D.N.Y. 1997), appeal pending, No. 97-2629 (2d Cir.). The government's position is that, as a general rule, a petition in district court for a writ of habeas corpus is not the avenue by which an alien may raise a constitutional challenge to her deportation. Rather,

DISCUSSION

1. The court of appeals in this case correctly held that Section 242(g) of the Immigration and Nationality Act (INA), 8 U.S.C. 1252(g) (Supp. II 1996), expressly bars district court jurisdiction over petitioner's action, which was brought to raise, *inter alia*, a claim that her deportation in contravention of a purported agreement with the government would violate the Constitution. As petitioner points out (Pet. 10-12), however, in *American-Arab Anti-*

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such an alien may and must present her constitutional claim to the court of appeals on petition for review of a deportation order or (as in this case) on petition for review of the denial of a motion to reopen a deportation order. See 8 U.S.C. 1252(a)(1) (Supp. II 1996); see also IIRIRA § 306(b) (repealing 8 U.S.C. 1105a(a) (1994)), which previously authorized habeas corpus proceedings for aliens held in custody). Petitioner currently has a petition for review pending in the Fourth Circuit, see Pet. App. 63-65, and in our view that court has jurisdiction to entertain any claim of fundamental constitutional error raised by petitioner. In the rare case in which there might be unresolved factual issues bearing on the constitutional claim, the court of appeals may refer the matter to a district court for a hearing pursuant to 28 U.S.C. 2347(b)(3), as incorporated by 8 U.S.C. 1105a(a) (1994) (repealed by IIRIRA § 306(b)) and 8 U.S.C. 1252(a)(1) (Supp. II 1996). But see *American-Arab Anti-Discrimination Committee* v. *Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997) (holding that such references from courts of appeals to district courts are not available on judicial review of final orders of deportation, and therefore aliens should be able to seek relief in district court in first instance). To the extent that the Seventh Circuit's decision in *Turkhan* v. *INS*, 123 F.3d 487 (1997), may be read to hold that the courts of appeals are absolutely without jurisdiction to entertain constitutional challenges to deportation orders brought by aliens who have been found deportable based on a conviction for an aggravated felony, we do not agree with that decision.

Discrimination Committee, 119 F.3d 1367 (1997) (*AADC*), the Ninth Circuit, in contrast to the D.C. Circuit in this case, has not applied Section 242(g) according to its express terms, and has allowed a constitutionally based district court challenge to deportation proceedings to continue. For that reason, and because the issue of district court jurisdiction is one of recurring importance under the Immigration and Nationality Act (INA),[7] we agree with petitioner that that jurisdictional issue warrants review by this Court.

We have today filed a petition for a writ of certiorari to review the decision of the Ninth Circuit in *AADC*. See *Reno* v. *American-Arab Anti-Discrimination Committee*, petition for cert. pending, No. 97-1252 (filed Jan. 30, 1998).[8] We explain in the certiorari petition in *AADC* that Section 242(g) of the INA was enacted as part of IIRIRA to make absolutely clear what should have been clear all along: that exclusive jurisdiction to review deportation orders lies in the courts of appeals pursuant to the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351, as expressly mandated by the INA itself. See 8 U.S.C. 1105a (1994); 8 U.S.C. 1252 (Supp. II). We also explain why the Ninth Circuit's contrary view fundamentally disrupts the statutory scheme Congress enacted for the expeditious removal of aliens, and why the jurisdictional

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[7] See also *Auguste* v. *Attorney General*, 118 F.3d 723 (11th Cir. 1997); Brief for the United States in Opposition (at 14-17) in *Igbonwa* v. *United States*, petition for cert. pending, No. 97-6518.

[8] We have provided counsel for petitioner in this case with a copy of our petition in *AADC*.

issue warrants review by this Court. See *AADC* Pet. 13-20.

We believe that *AADC* would be a better vehicle than this case for the Court's consideration of the jurisdictional issue. Not only did the Ninth Circuit there decline to apply Section 242(g) according to its terms and allow a district court action to continue, but also the specific basis for the Ninth Circuit's ruling—that the INA's provisions for exclusive jurisdiction in the courts of appeals following entry of a final order of deportation do not bar district court jurisdiction over a First Amendment selective enforcement claim—squarely conflicts with the decision of the Third Circuit in *Massieu* v. *Reno*, 91 F.3d 416 (1996), where the court of appeals ordered the dismissal of a First Amendment selective enforcement claim brought in district court. See *id.* at 418, 426; *Massieu* v. *Reno*, 915 F. Supp. 681, 689 (D.N.J. 1996); *AADC* Pet. 13-15, 20. *AADC* therefore would furnish the Court with an occasion not only to address the general operation of Section 242(g), but also to resolve the question whether an implied exception to the INA's exclusive jurisdictional provisions can be recognized for selective enforcement claims, or even for constitutional claims more broadly. The Court's decision in *AADC* then would, in turn, resolve the jurisdictional issue in this case.

In addition, as we also explain in the certiorari petition in *AADC* (at 21-30), the First Amendment ruling by the Ninth Circuit in that case conflicts with decisions of this Court in a number of respects and substantially interferes with the Executive Branch's ability to enforce the immigration laws and protect the national security, and therefore independently warrants review by this Court. If the

Court were to conclude that a district court does have jurisdiction over a case raising a selective enforcement claim (or constitutional claims more broadly), it could then review the Ninth Circuit's erroneous First Amendment ruling on the merits.

For the foregoing reasons, we suggest that the Court hold the petition in this case pending the disposition of *AADC*.

2. Petitioner further contends (Pet. 13-15) that the court of appeals erred in concluding that the preclusion of judicial review in Section 242(g) of the INA effected by the IIRIRA amendment is applicable to cases such as this one that were pending in the federal courts at the time of IIRIRA's passage. She also argues that the court of appeals' decision on that point is contrary to a decision of the Seventh Circuit, *Turkhan* v. *INS*, 123 F.3d 487 (1997), and to this Court's retroactivity decisions in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), and *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997). Those contentions are incorrect; the decision below on the application of Section 242(g) to pending cases is correct, and it does not conflict with any decision of this Court or any other court of appeals.

The court of appeals concluded that Section 242(g), as amended, applied to petitioner's case, even though the case was pending when the statute was amended.[9]

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[9] Petitioner also states (Pet. 15 n.6) that, "[e]ven if Section 242(g) were somehow deemed to apply retroactively, it simply does not cover this case" because this case, in her view, involves a breach of contract and not a decision by the Attorney General to execute a deportation agreement. That argument is without merit. In light of the Board's denial of petitioner's motion to reopen her deportation proceeding and the subsequent efforts of the INS to deport her, the instant action

That construction of the statute is correct. Section 306(a)(2) of IIRIRA amended Section 242 of the INA, 8 U.S.C. 1252, which governs judicial review procedures for deportation cases, and added the exclusive jurisdiction provision in Section 242(g), 8 U.S.C. 1252(g) (Supp. II 1996). Section 306(c)(1) of IIRIRA provides the effective date for INA Section 242(g), which is different from the effective date for the other amended provisions in Section 242. Section 306(c)(1) of IIRIRA provides:

> IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as amended by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

IIRIRA § 306(c)(1), 110 Stat. 3009-612, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(1), 110 Stat. 3657. That language clearly states that Section 242(g) applies "without limitation" to *all* cases, regardless of when they were filed.

Section 306(c)(1) of IIRIRA provided that Section 242(g)'s preclusion of review became effective and applicable to pending cases upon the enactment of IIRIRA, September 30, 1996, or, at the latest, on April 1, 1997, IIRIRA's general effective date.[10] Petitioner

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necessarily is one "arising from the decision or action by the Attorney General to * * * execute" petitioner's deportation order.

[10] The Seventh and Ninth Circuits have held that Section 242(g) did not become effective until April 1, 1997, but

argues, however, that the more general transition rule found in Section 309(c)(1) of IIRIRA, prohibiting application of the judicial review amendments to deportation cases commenced before April 1, 1997, applies to Section 242(g). That reading of the statute ignores IIRIRA § 306(c)'s specific exception of INA § 242(g) from IIRIRA § 309. As quoted above, Section 306(c)(1) of IIRIRA separates INA § 242(g) from the other judicial review provisions, and expressly dictates that it shall be applied without limitation to all past and pending cases.

The decision of the court of appeals is consistent with the decision of the Ninth Circuit on this point in *AADC*, *supra*. In that case, although the Ninth Circuit held that the exclusive-jurisdiction provision did not preclude review in the district court of constitutional claims, it did hold that "IIRIRA explicitly provides for the retroactive application of subsection (g)," and that "the provision carves out an exception to the general rule, specified in section 309(c), that IIRIRA does not apply to pending cases." 119 F.3d at 1371. The Ninth Circuit "follow[ed]" the decision of the court below on that point and concluded that "subsection (g) applies retroactively." *Id.* at 1372.

The decision of the Seventh Circuit in *Turkhan* v. *INS*, *supra*, does not conflict with the decision of the court of appeals in this case. In *Turkhan*, the Seventh Circuit held that it lacks jurisdiction to review constitutional claims brought by certain

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that, after that date, courts must apply it to all pending cases. *Lalani* v. *Perryman*, 105 F.3d 334 (7th Cir. 1997); *Fuchslocher* v. *INS*, 110 F.3d 1394 (9th Cir. 1997). As petitioner's case was pending on both September 30, 1996, and April 1, 1997, Section 242(g) applies to her case.

criminal aliens seeking direct review of a deportation order in the court of appeals.[11] In reaching that conclusion, the Seventh Circuit observed that Section 309 of IIRIRA "makes these new judicial review provisions inapplicable to aliens who are in deportation proceedings [before] April 1, 1997." 123 F.3d at 489. The *Turkhan* case, however, did not involve IIRIRA § 306(c)(1), which makes clear that the operation of INA § 242(g) is excepted from the general transition rule in IIRIRA § 309. Indeed, the Seventh Circuit had previously examined IIRIRA § 306(c) in *Lalani* v. *Perryman*, 105 F.3d 334 (1997), and had held there that Section 242(g) is to be applied to all pending cases as of April 1, 1997. *Id.* at 336.[12]

The court of appeals' decision is also consistent with this Court's decisions concerning the application of intervening statutes to pending cases. In *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Court explained that "intervening statutes conferring or ousting jurisdiction" are ordinarily given immediate effect, "whether or not jurisdiction lay

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[11] To the extent that *Turkhan* may be read to state an absolute rule precluding review even of substantial constitutional claims by the court of appeals, the government does not agree with that decision. In our view, a court of appeals may, on petition for review of a deportation order filed by an alien who has been found deportable based on his criminal conviction of an aggravated felony, review the deportation order for substantial and fundamental constitutional claims. See note 6, *supra*.

[12] The specific issue in *Lalani* concerned whether Section 242(g) became effective upon the date of enactment of IIRIRA, September 30, 1996, or on April 1, 1997, the general effective date for IIRIRA set forth in Section 309(a). That particular issue is moot here because the April 1, 1997, effective date has passed. See note 10, *supra*.

when the underlying conduct occurred or when the suit was filed." *Id.* at 274. "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than the rights or obligations of the parties.'" *Ibid.*[13] Thus, a law ousting the courts of jurisdiction applies to pending cases unless there is an express reservation of jurisdiction for those cases. *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) ("[W]hen a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law."); see *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 390 (1953) ("When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved."). Congress provided express language dictating Section 242(g)'s application to pending cases, without any reservation. Nothing further is required for it to apply here.

A different result is not suggested by either *Hughes Aircraft* or *Lindh*. *Hughes Aircraft* concerned a statute that created a new cause of action as to certain *qui tam* claims that federal courts previously were barred from hearing and deciding; the Court there concluded that the new statute, conferring power to hear and decide such claims, was not to be applied to pending litigation. The Court in *Hughes Aircraft* cited the holding in *Landgraf* that

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[13] As Justice Scalia also observed in *Landgraf*, the "jurisdiction cases [may be] explained * * * by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." 511 U.S. at 293 (opinion concurring in the judgments).

jurisdictional statutes apply to cases pending at the time of their enactment because they "speak to the power of the court rather than to the rights or obligations of the parties," 117 S. Ct. at 1878 (quoting *Landgraf*, 511 U.S. at 274), but then concluded that the statute at issue in *Hughes Aircraft* was *not* a jurisdictional statute that would be presumptively applicable to pending cases because it spoke "not just to the power of a particular court but to the substantive rights of the parties as well," *ibid.* As the Seventh Circuit explained in *Turkhan*, "*Hughes* tells us only that statutes creating new causes of action—even though phrased in jurisdictional terms—can have prohibited retroactive effects. *Hughes* does nothing to undermine the Supreme Court's holding in *Landgraf*." 123 F.3d at 488 n.3. *Hughes Aircraft* therefore does not control the application of Section 242(g), a jurisdiction-ousting provision concerning the power of the courts, not the substantive rights or obligations of the parties.

Petitioner's reliance on *Lindh* is equally misplaced. The Court in that case found no reason to resort to general principles governing the prospective or retroactive application of statutes (see 117 S. Ct. at 2062-2063) because a thorough contextual analysis of the statute at issue (*id.* at 2063-2068) "reveal[ed] Congress's intent to apply the amendments [in question] only to such cases as were filed after the statute's enactment" (*id.* at 2063). In this case, by comparison, the clarity of IIRIRA's plain language demonstrates that Congress's intent was that Section 242(g) should be applied to pending cases. And to the extent that *Lindh* relied on a negative implication in the statutory provision in question to conclude that the statute did not apply to pending

cases (*id.* at 2068), the decision also does not control this case, for there is no such implication in IIRIRA.

3. In light of its conclusion that Section 242(g) applies to pending cases and bars district court jurisdiction, the court of appeals properly vacated the district court's decision. The court of appeals correctly determined that it possessed residual jurisdiction to prevent the district court's order from escaping appellate review. In Section 242(g), Congress declared that "no court"—including the district courts—shall have jurisdiction over claims such as the one made in this case, except as otherwise provided by law. The court of appeals had the duty to ensure that "no court" in the federal court system acted outside its statutory authority by interfering with the Attorney General's decision to execute a deportation order against petitioner. *Assessor* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870); see *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16, 18 (1934); *Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. 379, 385-386 (1884). And the court of appeals had express statutory authority to vacate the judgment and remand for entry of an order of dismissal. See 28 U.S.C. 2106.

Petitioner appears to argue that, if Section 242(g) divested all courts, including the courts of appeals, of jurisdiction over pending cases like this one, then the court of appeals lacked authority even to set aside the judgment of the lower court for lack of jurisdiction. But as this Court observed of an analogous issue involving the Article III requirement of a live case or controversy, "reason and authority refute the * * * notion that a federal appellate court may not take any action with regard to a piece of litigation once it has been determined that the requirements of Article III

no longer are (or indeed never were) met. * * * Article III does not prescribe such paralysis." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994). Accordingly, this Court has held that vacatur of a lower court's order, with directions to dismiss for mootness, is appropriate when the cause of the mootness is not attributable to either party. See *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267-268 (1936); see generally *Bonner Mall*, 513 U.S. at 25; *Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1072 (1997). It is appropriate for a court of appeals to take similar action when Congress removes a class of controversies from the statutory jurisdiction of the federal courts. See also *Auguste* v. *Attorney General*, 118 F.3d 723, 727 (11th Cir. 1997) (adopting rationale of decision below with respect to Section 242(g))).

CONCLUSION

With respect to the issue of district court jurisdiction raised by the first question presented in the petition for a writ of certiorari, the petition should be held pending the disposition of *Reno* v. *American-Arab Anti-Discrimination Committee*, petition for cert. pending, No. 97-1252 (filed Jan. 30, 1998), and then disposed of in accordance with the Court's disposition of that case. In all other respects, the petition should be denied.

Respectfully submitted.

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